FRANCHISE TERMINATIONS: FORUM SELECTION AND CHOICE OF LAW

Franchise agreements and other contracts generally provide for choice of applicable law and selection of forum for resolution of disputes. Following a discussion of forum selection clauses in the *Journal of the Missouri Bar* issue of March 1991, three successive decisions from the U.S. Supreme Court, the Eighth Circuit Court of Appeals, and the Supreme Court of Missouri have combined to significantly affect Missouri law on the enforceability of these contractual provisions. A party seeking to overcome the application of such contractual provisions in a Missouri court now have a very heavy burden.

INTRODUCTION. Three separate decisions handed down since April, 1991 from the Missouri Supreme Court, the Eighth Circuit and the United States Supreme Court, respectively, all significantly affect Missouri law on the enforceability of forum selection clauses and choice of law provisions in contracts. Two of these cases specifically consider Missouri law regarding franchise terminations.

The Missouri Supreme Court decided *High Life Sales Co. v. Brown-Forman Corp.* ("*High Life Sales Co.*")[1], a claim for wrongful termination of a Missouri franchise in violation of Section 407.413 RSMo (1986). Although the court held that a forum selection clause in the written agreement between the parties is enforceable if not unreasonable or unfair under the circumstances, the strong public policy expressed by the State of Missouri in its statute prohibiting that franchise termination, rendered enforcement of the forum selection clause unreasonable.

In *Electrical and Magneto Service Co. v. AMBAC International Corp* ("*E.M.S. v. AMBAC*"),[2] the Eighth Circuit considered termination of a Missouri franchise in violation of Section 407.405 RSMo (1986). That court refused to apply a South Carolina choice of law provision contained in the written agreement because this would constitute a waiver of the benefits of Section 407.405, which requires written notice of termination of a franchise within 90 days. The court stated, "to do so would violate a fundamental policy of Missouri."[3]

In *Carnival Cruise Lines, Inc. v. Shute* ("*Carnival Cruise Lines*"),[4] the U.S. Su-

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preme Court considered a forum selection clause which was part of the boiler-plate language of a cruise line passage contract ticket. The Washington State-based plaintiffs bought Los Angeles-to-Mexico cruise tickets in Washington, and following an injury on board the cruise ship, they filed suit in Washington state. The ticket required that all lawsuits be filed in Florida. The court enforced the ticket's provisions by granting summary judgment against plaintiffs. The court made the express finding that the dispute was "not essentially a local one inherently more suited to resolution in Washington than in Florida."[5]

This article will discuss the effect of these three decisions in the context of franchise terminations and breach of contract cases in the State of Missouri. A review of the facts and holding in each case begins the discussion.

HIGH LIFE SALES CO. High Life Sales Company, a beer distributor in the Kansas City, Missouri area, distributed a brand of wine cooler as a wholesaler for Brown-Forman Corporation, a wine and liquor supplier located in Kentucky. The parties had a written distribution agreement which provided that any action related to the agreement shall be brought only in the judicial district of the defendant's principal place of business. The agreement further provided that Missouri law applied, specifically Sections 407.405 and 407.413 RSMo. Section 407.400 defines such a distributorship between a supplier and wholesaler as a franchise, and Section 407.413 provides that "notwithstanding the terms, provisions and conditions of any franchise, no supplier shall unilaterally terminate" any franchise with the wholesaler except for good cause.

In 1987, Brown-Forman terminated the distribution agreement, giving 90 days' prior written notice as provided by Section 407.405. Brown-Forman conceded that the reason for termination did not meet the statutory definition of "good cause,"[6] although the termination was arguably done for legitimate business reasons as part of a nationwide consolidation of distributors. High Life Sales Co. filed suit in Jackson County Circuit Court to recover lost profits.

Defendant Brown-Forman filed a motion to dismiss, because the forum selection clause required suit to be brought in Kentucky, the defendant's principal place of business. The trial court denied the motion, a jury awarded plaintiff damages, and defendant appealed. The court of appeals affirmed, and the supreme court accepted transfer.

The Missouri Supreme Court decided in an opinion written by Judge Thomas that it was time to change Missouri law on the enforceability of forum selection clauses. Because the earlier law was discussed in an article by Russell Piraino in the March 1991 issue of this Journal, and further explained in Judge Thomas' opinion, it need not be reviewed at length here. The *High Life Sales Co.* court did note as to prior law, however, that a forum selection clause selecting a court in another state (an outbound clause) was not previously enforceable in Missouri, whereas a forum selection clause selecting a court in Missouri (an in-bound clause) was enforceable. The court rejected the historical dichotomy, instead adopting the simpler formulation utilized by the majority of state courts that all forum selection clauses are enforceable so long as enforcement is neither unfair nor unreasonable.

Judge Thomas noted: "We are proud of the Missouri courts but not so much as to override a valid agreement entered into by our citizens to litigate elsewhere."[7]

The leading case in this area had been *M/S Bremen v. Zapata Off-Shore Company* ("*The Bremen*"),[8] decided by the U.S. Supreme Court in 1972, which enforced a

forum selection clause as a matter of federal law in an admiralty case, holding such clauses generally to be enforceable unless the party opposing enforcement clearly shows that it is either unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.

Enforcement of the clause in *High Life Sales Co.*, however, was deemed unreasonable because of the strong public policy of the State of Missouri expressed in the statute to prohibit such franchise terminations without good cause. This strong public policy along with several other factors dictated that it would be unreasonable for Missouri to send this case to Kentucky.

Judge Thomas explained: "The rule adopted today combines the best of both worlds in that it retains jurisdiction when the Missouri courts determine that to be necessary or desirable and not unfair while enforcing the valid agreement of the parties on other occasions."[9]

The court in *High Life Sales Co.* noted that liquor distribution is an area that has always been heavily regulated by state government and that the methods of distribution and extent of regulation vary enormously from state to state. Thus, the interest that a particular state has in construing and applying liquor control legislation in its own state is apparent.[10]

The court cited other factors, in that Section 407.413 had never yet been interpreted by a Missouri court, so that a Kentucky court would have no guidance. Further, Kentucky has no statute even remotely similar to Missouri's. This suggested to the court that Kentucky's public policy is contrary to that of Missouri's.

Moreover, other courts have followed the same rationale of refusing to enforce forum selection clauses when to do so would appear to violate a strong public policy expressed by statute. The court cited with approval Wisconsin cases regarding the Wisconsin Franchise Investment Statute"[11] and the Wisconsin Fair Dealership Law,[12] as well as a California decision regarding the California Corporate Security Law.[13]

That same rationale had been applied several months earlier by the Eighth Circuit in *E.M.S. v. AMBAC*, where the court found the public policy expressed in Chapter 407 to be so strong that the parties would not be allowed to waive its benefits.

E.M.S. v. AMBAC. Electrical & Magneto Service Co., Inc. (E.M.S.) distributed diesel equipment pursuant to a franchise agreement with AMBAC, a Delaware corporation with its principal office in South Carolina. AMBAC terminated the franchise agreement in 1988, ten days after giving written notice that AMBAC believed there had been a breach of the agreement by E.M.S. E.M.S. then sued AMBAC for damages for failure to comply with Section 407.405 RSMo., requiring a 90 days prior written notice before cancellation of a franchise agreement. Suit was filed in the Western District of Missouri.

The defendant manufacturer sought summary judgment on the grounds that South Carolina law governed the action due to a choice of law provision in the franchise agreement. The district court granted summary judgment, but the Eighth Circuit reversed. The Eighth Circuit based its decision on Restatement (Second) of Conflicts, Section 187,[14] and the Missouri case of *State ex rel. Geil v. Corcoran*,[15] holding that the choice of law provision in the agreement would be given effect unless to do so would violate a fundamental policy of Missouri. The Eighth Circuit found that "all of Section 407.405 is grounded in strong pubic policy."[16]

The Eighth Circuit noted that the statutes contained in Chapter 407 are "paternalistic legislation designed to protect those that could not otherwise protect themselves. . . Furthermore, the very fact that this

legislation is paternalistic in nature indicates that it is fundamental policy" as described in Restatement (Second) of Conflicts Section 187, Comment g.[17]

Finally, the Eighth Circuit noted that "the Missouri statutes in question . . . are obviously a declaration of state policy and are matters of Missouri substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless."[18]

CARNIVAL CRUISE LINES, INC. V. SHUTE. The U.S. Supreme Court has also very recently considered the enforceability of forum selection clauses. In *Carnival Cruise Lines*, the court enforced a forum selection clause it found to be reasonable in those circumstances. The court expressly noted that boundaries of its inquiry as "a case in admiralty and federal law governs."[19] In *Carnival Cruise Lines*, a married couple living in the State of Washington purchased tickets for a seven day cruise, through a travel agent also located in Washington. The cruise line's headquarters were in Miami, Florida, although the cruise began in Los Angeles, California, bound for Mexico with a return to Los Angeles. While the ship was in international waters, the plaintiff slipped and fell on a deck mat and suffered injuries. She and her husband then sued the cruise line in U.S. District Court for the Western District of Washington.

The cruise ticket contained on its reverse side a number of printed conditions, including the agreement that all disputes shall be litigated in the State of Florida to the exclusion of the courts of any other state or country.[20] Plaintiffs admitted having notice of this provision before boarding the ship in Los Angeles. The Ninth Circuit had held in favor of the plaintiffs and refused to enforce the provision, because it was not freely bargained for and because enforcement would effectively deprive plaintiffs of their day in court due to physical and financial constraints.

The U.S. Supreme Court reversed, rejecting as immaterial plaintiffs' argument that the forum selection clause had not been negotiated. The court found such a clause would likely never be negotiated and considered it reasonable, in the context of a routine commercial cruise ticket, to avoid confusion among litigants and arguably to result in a fare reduction to the general public due to a savings by the cruise line in expenses from other litigation.

The court further held that this was not a dispute that was "essentially local" and inherently more suited to resolution in the State of Washington. Although such clauses in form contracts are subject to judicial scrutiny for fundamental fairness,[21] there was no indication of fraud or overreaching by the cruise line. Accordingly, the plaintiffs had failed to satisfy their "heavy burden of proof" to avoid enforcement of the clause.

The court in *Carnival Cruise Lines* discussed its 1972 decision in *The Bremen*, also a case in admiralty. The court held in *The Bremen* that forum selection clauses are prima facie valid and the party claiming unfairness on the grounds of inconvenience should bear a heavy burden of proof. This burden was not clearly described, but *The Bremen* court hinted that the party seeking to avoid the clause may have to show that enforcement effectively deprives the party of its day in court.[22]

The *Carnival Cruise Lines* court emphasized that the cruise line had not designated Florida courts for the purpose of discouraging legitimate claims. The cruise line maintained its principal place of business in Florida, and many of its cruises used Florida ports. Further, there was no evidence of fraud or overreaching, and the plaintiffs admitted notice of the provision, which presumably gave them "the option of rejecting the contract with impunity."[23] Fi-

nally, the court found that the enforcement of the clause did not violate federal statute.[24]

DISCUSSION. The Missouri franchise termination statute[25] is such a strong expression of Missouri public policy that it now overrides Missouri's public policy favoring freedom of contract in forum selection clauses (under the *High Life Sales Co.* case) and choice of law provisions (*E.M.S. v. AMBAC*). This is not the universally applied rule in other states, however.

In New Mexico, in a case also involving Brown-Forman arising out of the same nation-wide consolidation which generated the *High Life Sales Co.* case, the Supreme Court of New Mexico reached the opposite result.[26] The terminated distributor in that case claimed violation of the New Mexico Alcohol Beverage Franchise Act.[27] Brown-Forman defended by citing a choice of law provision in the agreement designating Kentucky law rather than New Mexico law. That court found that application of Kentucky law would not offend the public policy of New Mexico expressed in the Alcohol Beverage Franchise Act, and that the strong public policy favoring freedom of contract required enforcement of contractual language unless to do so would clearly contravene some law or rule of public morals. In *High Life Sales Co.* the parties had chosen Missouri law and a Kentucky forum; whereas in this New Mexico case the parties selected Kentucky law and a Kentucky forum.

In Ohio, a wine wholesaler brought an action in U.S. District Court for wrongful termination of its franchise claiming violation of the Ohio Alcoholic Beverages Franchise Act.[28] The agreement in that case chose application of California law and designated the State of California as the appropriate venue for any actions under the agreement. The Northern District of Ohio found that Ohio's interest in providing a local forum for its residents was not substantial enough to defeat an otherwise valid choice of forum and choice of law clause. That court further held that enforcement would not contravene any strong public policy of the State of Ohio.

In Illinois, in an action to enforce an agreement for the lease of a commercial french fryer, the state appellate court enforced the parties' choice of Michigan law because Illinois public policy was not offended by the application of Michigan law.[29]

This was so even though the plaintiff's action was based on the Illinois Consumer Fraud and Deceptive Business Practices Act,[30] which required advance notice of termination, and the Michigan consumer protection statute did not.

In Texas, a purchaser of a computer system brought a claim in U.S. District Court under the Texas Deceptive Trade Practices - Consumer Protection Act against the manufacturer of computer hardware and a licensor of software.[31] The purchase agreement chose California law, and selected the courts of San Diego County, California for any actions. The motion before that court was for transfer, rather than for dismissal.[32] That federal court refused to recognize a strong public policy in the State of Texas for two reasons. First, the court stated that federal law governs the enforceability of forum selection clauses for federal courts sitting in diversity jurisdiction.[33] Second, because the court doubted the applicability of the Texas statute under the choice of law clause, and because the Texas statute was oriented toward consumers rather than business customers, the court chose to enforce the forum selection clause.

Before the *Carnival Cruise Lines* decision, courts have refused to enforce forum selection clauses for a number of other reasons besides the public policy of the non-designated state.

When the law of the forum state applies,

the forum state favors retention of jurisdiction.[34] Courts have refused to enforce forum selection clauses if to do so could deprive the plaintiff ultimately of its remedy.[35] The *High Life Sales Co.* court hinted at this in the additional factors supporting its decision, because of the apparent lack of a public policy in Kentucky favoring liquor distributors.[36]

Some courts have considered whether the forum selection clause was part of an adhesion contract or a negotiated item in the agreement.[37] The forum selection clause was not considered adhesive in the *High Life Sales Co.* opinion,[38] but on the other hand, the U.S. Supreme Court enforced "boiler-plate" language in *Carnival Cruise Lines*.[39]

The convenience of the parties and witnesses, and accessibility of evidence,[40] have favored trial in the forum state in cases deciding the enforceability of a forum selection clause. Again, at least in the context of admiralty and when the motion before the court is for dismissal or summary judgment, *Carnival Cruise Lines* has made these factors irrelevant.

Also, dismissals are not favored if to do so would require two trials on the same issues or retrial of the same action.[41] The fact that a case has already proceeded through trial and further that the plaintiff may be barred in the designated state due to a statute of limitations has been a stated reason for refusing to enforce a forum selection clause.[42]

Following *The Bremen*, there is a long line of federal decisions holding that enforceability of forum selection clauses is a federal procedural issue, on which federal law controls. This rule had been expressly recognized in Missouri by the Eighth Circuit,[43] and then soon modified to recognize Missouri public policy for the reason that choice of forum can also be an important substantive contract right.[44] Further, the motion presented to a federal court can be one for transfer, at defendant's option, rather than dismissal or summary judgment based on improper venue. Federal rules permit the action to be transferred to any venue in which the action may have been brought originally.[45]

This obviously becomes important for the aggrieved party contemplating the filing of an action in a Missouri court. On a motion for transfer in federal court, the convenience of the designated forum to the witnesses and parties remains an important factor.[46] The party in federal court also faces the probable application of the *Carnival Cruise Lines* case, which might otherwise be distinguished in a state court action. Even in state court, however, a defendant may seek removal if there is diversity of citizenship.

The U.S. Supreme Court in both of its decisions, *The Bremen* and *Carnival Cruise Lines*, was deciding cases in admiralty under federal law. *The Bremen* has been followed widely by state and federal courts alike,[47] and it seems likely that the *Carnival Cruise Lines* decision will have an equally pervasive effect in non-admiralty cases.

A restrictive reading of *Carnival Cruise Lines* would focus on the following language from Justice Blackmun's opinion: "First a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora."[48] Clearly these considerations will not apply in the typical contract dispute between two business interests, and the *Carnival Cruise Lines* decision may be distinguished on that basis. A more expansive reading could result, however, in enforcement of these clauses in any case which is not inherently a local dispute or in which there is compelling proof of fraud or overreaching.

In *Carnival Cruise Lines*, with respect to

overreaching, the fact that the contract provisions were not negotiated was deemed irrelevant. The fact that the parties had unequal bargaining power was deemed irrelevant. Therefore, an attack on a forum selection clause based on a claim of overreaching by the more powerful bargaining partner would now seem unlikely to prevail, absent fraud. Nonetheless, the finding of the U.S. Supreme Court that lack of negotiation and unequal bargaining power was irrelevant, is contrary to the findings of the Eighth Circuit, the Missouri supreme court, and the Restatement, enforcing a state's fundamental policy to protect against the oppressive use of superior bargaining power and adhesive contracts.[49]

The *Carnival Cruise Lines* court also chose to ignore the possibility that the plaintiffs were physically or financially incapable of pursing litigation in the designated state. The claim of inconvenience will only be considered when the claimants satisfy the "heavy burden of proof" mentioned above.

CONCLUSION. The *Carnival Cruise Lines* and *High Life Sales Co.* decisions may be reconciled by the language of the U.S. Supreme Court regarding an inherently local dispute. Clearly, the *High Life Sales Co.* decision turned on the importance of the Missouri public policy expressed in the statute, and Missouri's interest in regulation of the sale of alcoholic beverages within its boundaries. Accordingly, although not expressly stated by the *High Life Sales Co.* court, it can be argued that such a franchise termination is an inherently local dispute characterized by the territory of the franchise itself.

High Life Sales Co. and *E.M.S. v. AMBAC* both were decided after *Carnival Cruise Lines*. Prior to the decision in *Carnival Cruise Lines*, forum selection clauses had been held unreasonable in other courts for a variety of reasons. Whether any reasons other than fundamental state policy or fraud will continue to overcome the enforceability of a forum selection clause, in light of *Carnival Cruise Lines*, remains to be seen. □

FOOTNOTES

[1] 823 S.W.2d 493 (Mo.banc 1992).

[2] 941 F.2d 660 (8th Cir. 1991).

[3] 941 F.2d at 664.

[4] 111 S.Ct. 1522 (1991).

[5] 111 S.Ct. at 1528.

[6] Section 407.413.5 RSMo. (1986) defines good cause to mean either of the following:

a. Failure by the wholesaler to comply substantially with the provisions of an agreement or understanding with the supplier, which provisions are both essential and reasonable; or

b. Use of bad faith or failure to observe reasonable commercial standards of fair dealing in the trade.

[7] 823 S.W.2d at 496.

[8] 92 S.Ct. 1907 (1972).

[9] 823 S.W.2d at 496.

[10] 823 S.W.2d at 498.

[11] *See* Lulling v. Barnaby's Family Inns, Inc., 482 F.Supp. 318 (E.D.Wis.1980).

[12] *See* Cutter v. Scott & Fetzer Co., 510 F.Supp. 905 (E.D.Wis. 1981).

[13] *See* Hall v. Superior Court, 197 Cal.Rptr. 757 (Cal.App. 1983).

[14] Restatement (Second) of Conflicts, Section 187 (1988 Supp.), as quoted in E.M.S. v. AMBAC, provides in part as follows at Paragraph 2: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either . . . (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . ." 941 F.2d at 661-662.

[15] 623 S.W.2d 555 (Mo.App.E.D. 1981)

[16] 941 F.2d at 662.

[17] The court also cited the following language from comment g: "A fundamental policy may be embodied in a statute which . . . is designed to protect a person against the oppressive use of superior bargaining power." 941 F.2d at 663.

[18] 941 F.2d at 664.

[19] 111 S.Ct. at 1525.

[20] The ticket in its original form is printed following the Court's opinion. 111 S.Ct. at 1534-1538.

[21] 111 S.Ct. at 1528.

[22] Inability to bring live witnesses to trial is not enough, since they can be deposed. 92 S.Ct. at 1917-1918.

[23] 111 S.Ct. at 1528.

[24] The Limitation of Vessel Owners Liability Act, 46 U.S.C.A. Section 183c (1958).

[25] Sections 407.400 through 407.420 RSMo. (1986), which are contained in a subchapter entitled "Pyramid Sales Schemes."

[26] United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 775 P.2d 233 (N.M. 1989).

[27] The New Mexico Alcohol Beverage Franchise Act is contained in Section 60-8A-7 et seq., New Mex. Stat. Ann. 1978 (Repl. pamphlet 1989).

[28] Rini Wine Co. Inc. v. Guild Wineries and Distilleries, 604 F.Supp. 1055 (N.D.Oh. 1985), construing the Ohio Alcoholic Beverages Franchise Act, Ohio Rev. Code Ann. Section 1333.85 (page 1979).

[29] Potomac Leasing Co. v. Chucks Pub, Inc., 509 N.E.2d 751 (Ill.App. 1987).

[30] Ill. Rev. Stat. (1985, Chapter 121 1/2, paragraph 261 et. seq.)

[31] Hoffman v. Burroughs Corporation, 571 F.Supp. 545 (N.D.Tx. 1982) Vernon's Texas Code Annotated, Business and Commerce, Section 17.41 and following.

[32] 28 U.S.C.A. Section 1404(a), Section 1406(a) (1976).

[33] 571 F.Supp. at 548.

[34] Furbee v. Vantage Press, Inc., 464 F.2d 835, 837 (D.C.Cir. 1972).

[35] Ernest and Norman Hart Brothers, Inc. v. Town Contractors, Inc., 463 N.E.2d 355 (Mass. App. 1984); Quick Erectors, Inc. v. Seattle Bronze Corp., 524 F.Supp. 351 (E.D.Mo. 1981); Full-Sight Contact Lens Corp. v. Softlens, Inc., 466 F.Supp. 71, 73 (S.D.N.Y. 1978).

[36] 823 S.W.2d at 498.

[37] Colonial Leasing Co. of New England v. Best, 552 F.Supp. 605 (D.Or. 1982); Plum Tree, Inc. v. Stockment, 488 F.2d 754, 757 (3d Cir. 1973).

[38] 823 S.W.2d at 497.

[39] 111 S.Ct. at 1527.

[40] Anastasi Brothers Corp. v. St. Paul Fire and Marine Insurance Co., F.Supp. 862, 864 (E.D.Pa. 1981); Hawaii Credit Corp. v. Continental Credit Card Corp., 290 F.Supp. 848 (D.Haw. 1968); Exum v. Vantage Press, Inc., 563 P.2d 1314 (Wash.App. 1977); American Advertising Distributors, Inc., v. American Cooperative Advertising, Inc., 639 S.W.2d 775 (Ky. 1982.)

[41] Personalized Marketing Service, Inc. v. Stotler and Co., 441 N.W.2d 447 (Minn.App. 1989); Hester v. Clinic Masters, Inc., 371 S.2d 915, 917 (Al.Civ.App. 1979).

[42] Ernest and Norman Hart Brothers, Inc. v. Town Contractors, Inc., 463 N.E.2d 355 (Mass.App. 1984).

[43] Sun World Lines, Ltd. v. March Shipping Corp., 801 F.2d 1066 (8th Cir. 1986).

[44] Farmland Industries, Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 852 (8th Cir. 1986). See also Goy v. Breadeaux Pisa, Inc., 1987 WL 15548 (W.D.Mo. 1987)(not reported in F.Supp.), regarding a pizza franchise.

[45] 28 U.S.C.A. Section 1404(a).

[46] Midwest Mechanical Contractors, Inc. v. Tampa Constructors, Inc., 659 F.Supp. 526 (W.D.Mo. 1987); See also Kobush v. American Suzuki Motor Corp., 1990 WL 13511 (W.D.Mo. 1990)(not reported in F.Supp.)

[47] See cases cited in High Life Sales Co., 823 S.W.2d at 495; Chase Third Century Leasing v. Williams, 782 S.W.2d 408,411 (Mo.App.W.D. 1989). See also Restatement (Second) of Conflicts, Section 80 (1988 Supp.).

[48] 111 S.Ct. at 1527.

[49] High Life Sales Co., 823 S.W.2d at 498; E.M.S. v. AMBAC, 941 F.2d at 664.